STATE OF MICHIGAN

COURT OF APPEALS

GREG BIXBY and KAREN BIXBY, Plaintiffs/Counterdefendants-Appellants, v SUSAN E. GIESY, Trustee of the SUSAN E. GIESY Trust, Defendant/Counterplaintiff-Appellee.	UNPUBLISHED July 12, 2005 No. 261163 Ingham Circuit Court LC No. 03-001829-CH

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiffs appeal as of right from the trial court's order denying their motion for summary disposition and granting summary disposition in favor of defendant under MCR 2.116(I)(2). We affirm.

Plaintiffs and defendant own adjoining property. This case involves an easement by reservation created by a common grantor in the parties' respective chains of title. The common grantor, Thomas Perkins, entered into a land contract with defendant, in her individual capacity, and her husband, John Giesy (hereafter the "Giesys"), which was dated May 1, 1986, but not executed until June 1986. As part of the transaction, a land surveyor prepared a certificate of survey, dated Mary 28, 1986, which indicated on its face that it was prepared to comply with the certified surveys act, 1932 PA 170, MCL 54.211 *et seq.* Perkins and the Giesys also executed a memorandum of land contract that was dated May 1, 1986. It was recorded with the register of deeds in June 1986 for the purpose of giving record notice of the land contract. The memorandum referred to the certificate of survey for the description of the property.

Although the certificate of survey contained a description of an easement, it differed from the easement expressed in an addendum to the parties' land contract in terms of both location and scope. The addendum to the land contract provided:

> Purchaser acknowledges that Seller shall retain a 33 foot easement running from west to east beginning 500 feet north of the southwest corner to provide access to Seller's remaining property. *This easement shall not be transferred to Seller's successors*. [Emphasis added.]

The certificate of survey also included a thirty-three-foot easement running west to east, but placed it more than twenty feet north of the easement identified in the addendum and described its purpose as "ingress and egress by adjourning owners."

Perkins conveyed the adjoining property without reference to an easement to plaintiffs' predecessors before the land contract with the Giesys was fully performed. On November 29, 1988, Perkins executed a warranty deed to the Giesys in satisfaction of the land contract, which contained a property description that mirrored the certificate of survey, but did not mention the no-transfer restriction contained in the addendum to the land contract. Similarly, the Giesys used a description that mirrored the certificate of survey when quitclaiming the property to defendant as trustee in March 2000.

Plaintiffs, as successors in title to adjoining property previously owned by Perkins, filed the instant action in 2003, seeking a declaration that they were beneficial owners of an ingress and egress easement over defendant's property. Defendant sought a declaration that the easement was not transferable by Perkins and, alternatively, counterclaimed to have the scope of the easement limited to foot traffic, consistent with the alleged intent under which it was created. The trial court did not reach the merits of defendant's counterclaim. In the context of considering plaintiffs' motion for summary disposition under MCR 2.116(C)(9) and (10), the trial court determined that defendant was entitled to summary disposition under MCR 2.116(I)(2), concluding that there was but a single, nontransferable easement, which was extinguished in 1988 when Perkins conveyed the adjoining property.

A trial court's decision to grant summary disposition is reviewed de novo. *Unisys Corp v Comm'r of Ins,* 236 Mich App 686, 689; 601 NW2d 155 (1999). Because the trial court considered proofs outside the pleadings, we review the trial court's substantive ruling under MCR 2.116(C)(10). *Spiek v Dep't of Transportation,* 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999). The motion is properly granted when the parties' submitted evidence, viewed in a light most favorable to the opposing party, fails to establish a genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* The trial court may grant summary disposition to the nonmoving party if that party is entitled to judgment as a matter of law. MCR 2.116(I)(2).

Plaintiffs have not established any basis for relief. Because plaintiffs do not address the trial court's interpretation of the land contract as containing a single, nontransferable easement, any issue in that regard is deemed abandoned. "The failure to brief the merits of an allegation of error is deemed an abandonment of an issue." *In re JS & SM,* 231 Mich App 92, 98; 585 NW2d 326 (1998), overruled on other grounds sub nom *In re Trejo,* 462 Mich 341, 343 (2000), citing *People v Kent,* 194 Mich App 206, 210; 486 NW2d 110 (1992). We similarly deem abandoned any challenge to the trial court's decision that the nontransferable easement was extinguished on May 27, 1988, when Perkins conveyed the adjourning property, and that the easement could not be revived. *Id*.

Hence, for purposes of our review, we assume that the land contract provided for a single, nontransferable easement, notwithstanding the broader scope of the easement described in the certificate of survey prepared as part of the land contract transaction. We further assume that the easement was extinguished before Perkins executed the November 29, 1988, warranty deed.

Plaintiffs have failed to establish any basis for disturbing the trial court's application of the merger doctrine to the November 29, 1988, warranty deed. Under the merger doctrine, "a deed executed in performance of a contract for the sale of land operates as satisfaction and discharge of the terms of an executory contract." *Chapdelaine v Sochocki*, 247 Mich App 167, 171; 635 NW2d 339 (2001), citing *Mueller v Bankers' Trust Co of Muskegon*, 262 Mich 53, 57; 247 NW 103 (1933). An exception to the merger doctrine exists if a deed does not amount to full performance of a purchase agreement. *Chapdelaine, supra.* And an easement reserved by a grantor is not capable of fulfillment until after the deed is delivered. *Id.* at 172, citing *Kahn-Reiss, Inc v Detroit & Northern Savings & Loan Ass'n*, 59 Mich App 1, 6-7; 228 NW2d 816 (1975). Although the instant case does not involve a purchase agreement, a land contract is an executory contract. Our Supreme Court has "consistently held that under a land contract, although the vendor retains legal title until the contractual obligations have been fulfilled, the vendee is given equitable title, and that equitable title is a present interest in realty that may be sold, devised, or encumbered." *Graves v American Acceptance Mortgage Corp (On Rehearing)*, 469 Mich 608, 614; 677 NW2d 829 (2004). The merger rule applies to land contracts. See *Mueller, supra*.

The land contract in this case provided that "[u]pon full performance of Purchaser's covenants, Seller shall deliver to Purchaser a good and sufficient warranty deed, excepting only from the warranty: restrictions, rights, and easements of record at date hereof . . . ." The November 29, 1988, warranty deed signed by Perkins mirrored the property description contained in the certificate of survey prepared for the land contract, but did not fulfill the parties' agreement that the easement was nontransferable. Because Perkins did not provide a sufficient warranty deed, the merger doctrine does not apply as a matter of law.

Furthermore, this same result could be reached by recognizing that the land contract gave the Giesys, as equitable title owners, a present property interest in the servient estate. *Graves, supra* at 614. Equitable interests in land are subject to the writing requirement of the statute of frauds. See MCL 566.106; *Ripley v Seligman*, 88 Mich 177, 201; 50 NW 143 (1891); *McEwan v Ortman*, 34 Mich 325 (1876). Although parties are free to modify their contract, "the freedom to contract does not authorize a party to *unilaterally* alter an existing bilateral agreement." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003) (emphasis in original).

Here, even assuming that one could imply that Perkins intended to create a servitude by including "adjoining owners" easement language in the description of the land in the November 29, 1988, warranty deed, Perkins could not effectively reserve greater property rights in the deed than he retained under the land contract. Cf. *Pellerito v Weber*, 22 Mich App 242, 245; 177 NW2d 236 (1970) (a grantor cannot convey greater interest than he possesses); *Thomas v Bullock Co Comm*, 474 So 2d 1094, 1102 (Ala, 1985) (deed purporting to convey greater title, or more land, than possessed by a grantor, conveys only the title and land that the grantor possesses). Hence, as a matter of law, a writing signed by plaintiffs was necessary to create an easement greater than what was reserved in the land contract absent evidence that the parties reached a new agreement that superceded the land contract, and the statue of frauds could not be satisfied solely on the basis of the November 29, 1988 warranty deed signed by Perkins. See *Underwood v Slaght*, 213 Mich 391, 395; 182 NW 106 (1921).

Plaintiffs' reliance on *Nib Foods, Inc v Mally*, 70 Mich App 553, 560; 246 NW2d 317 (1976), to establish such an agreement is misplaced. The general rule recognized by this Court in *Nib Foods, Inc* was that

> if parties to a prior agreement enter a subsequent contract which completely covers the same subject, but which contains terms inconsistent with those of the prior agreement, and where the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement, leaving the subsequent contract as the sole agreement of the parties. *Joseph v Rottschafer*, 248 Mich 606, 610; 227 NW 784 (1929). [*Nib Foods, Inc*, *supra* at 560.]

The general rule is founded on the parties' intent to abrogate an earlier agreement by mutual consent, *Joseph*, *supra* at 610-611, and is consistent with the standards for a novation. A novation requires (1) parties able to contract, (2) a valid previous obligation to displace, (3) consent to the substitution by all parties, with sufficient consideration, and (4) the termination of the old obligation and formation of a valid new one. *George Realty Co v Gulf Refining Co,* 275 Mich 442, 447-448; 266 NW 411 (1936). The question rests in the parties' intent, as determined from surrounding and ensuing circumstances and conduct. *Gorman v Butzel,* 272 Mich 525, 529; 262 NW 302 (1935).

Here, the writings making up the land contract transaction and the later warranty deed are consistent in the description of the land, but the warranty deed does not cover the entire transaction. Neither Perkins' inadvertent inclusion of an easement in the warranty deed in violation of the land contract, nor the Giesys' acceptance of the warranty deed, can reasonably be construed as a novation. There is no evidence from which it could be inferred that Perkins' warranty deed to the Giesys was intended as anything other than to satisfy the land contract. Indeed, the warranty deed expressly states it was given in satisfaction of the land contract. Thus, Perkins' lack of full performance falls within the exception to the merger rule in *Chapdelaine*, *supra*. Moreover, Perkins' conveyance of adjoining property to plaintiffs' predecessors without reference to an easement, at a time when the easement was clearly nontransferable, demonstrated an intent to be bound by the terms of the land contract.

Although we agree with plaintiffs that this Court's decision in *Mulholland v Montcalm Co Rd Comm*, unpublished opinion per curiam, issued August 14, 1998 (Docket No. 199093), suggests a different result, unpublished decisions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). We do not find the reasoning in *Mulholland* persuasive with respect to the facts of this case and decline to follow it. Because no evidence was submitted to the trial court that, viewed most favorably to plaintiffs, supports a reasonable inference that Perkins and the Giesys mutually agreed to rescind the land contract and replace it with a new agreement permitting Perkins to reserve greater easement rights, the trial court correctly granted relief in favor of defendant with respect to this issue. As a matter of law, Perkins did not reserve an ingress and egress easement for adjourning owners by executing the November 29, 1988 warranty deed.

We have considered plaintiffs' remaining arguments on appeal, but are not persuaded that they provide any basis for disturbing the trial court's decision. To the extent that plaintiffs assert they were innocent third parties who relied on the recorded chain of title, plaintiffs have failed to establish that they either properly presented this claim to the trial court, or have adequately

briefed their assertion to invoke appellate review. A party may not merely state a position and leave it to this Court to ascertain and rationalize its basis. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens